

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

CC Docket No. 92-90

**REPLY TO THE COMMENTS OF THE NATIONAL ASSOCIATION OF
BROADCASTERS BY MARC B. HERSHOVITZ, MICHAEL JABLONSKI,
NED BLUMENTHAL AND C. RONALD ELLINGTON**

The National Association of Broadcasters misleads the Commission when it says its members – and specifically Susquehanna Radio Corp. – believe that “prerecorded audience invitation calls”¹ are permissible, a belief allegedly based on a “good faith” interpretation of the law. This is not what NAB’s members – specifically Susquehanna Radio Corp. – tell their listeners. On December 3, 2001, Susquehanna’s morning DJ’s (“Jimmy” and “Barnes”) had the following conversation with a caller:

Caller (Bobby): Came back from vacation, had [inaudible]-teen messages on my voice mail. Nine or 10 of ‘em were recorded messages from these computers wantin’ money. If you want my money, you call me and talk to me in person, don’t have a computer leave a message on my voice mail. Thank you.

Jimmy: I thought that was illegal.

Caller: I don’t know...

Jimmy: I thought, I thought that those automatic - uh - when you call somebody at home - uh - with an automatic answering machine or whatever, that those things are illegal, that those...

¹ “Prerecorded audience invitation calls” is Orwellian Doublespeak for prerecorded answering machine advertisements.

Caller: I had seven of them in one day.

Jimmy: I get them all the time.

Barnes: They are annoying.

Jimmy: I get them all the time.

Caller: Pisses me off.

Barnes: They are very annoying. Thank you Bobby, let's go to Rob...²

The truth can be found in the unscripted comments of WNNX-FM's morning show hosts.³ Radio and television stations' answering machine advertising campaigns are illegal under the Telephone Consumer Protection Act⁴ and, as WNNX-FM's Barnes said, "are very annoying."

Serving as the official apologist for its telemarketing members, the NAB's Comments filed in this matter engage in dissembling on a Clintonian scale. Whether the TCPA bans radio and television stations' "prerecorded audience invitation calls" is not determined by the telemarketing stations' self-serving characterization of their messages, but by the actual purpose of the prerecorded message. The actual, undisputed purpose of these telemarketing messages is to advertise the commercial availability and quality of services (their broadcast services) and property (the "prizes")

² See WNNX-FM "The Morning X" Radio Program, December 3, 2001. WNNX-FM, a Susquehanna Radio Corp. station, allows listeners to call in and rant - or "meltdown" - on the air for 30 seconds while the announcers converse with the caller. On December 3, 2001, "Bobby" called to rant about prerecorded telemarketing calls.

³ Interestingly, Jimmy Baron, the one who said he thought prerecorded answering machine advertisements are illegal, lent his voice to an annoying answering machine ad campaign for his station. Jimmy Baron's answering machine ad is the subject of litigation. See Garver v. Susquehanna Radio Corp., State Court Fulton County, Georgia, Civil Action No. 00-VS-002168-F (this case is currently before the Georgia Court of Appeals, oral arguments were held on September 18, 2002, and a decision is forthcoming).

⁴ 47 U.S.C. § 227.

given in exchange for listening or watching). They are prohibited by the TCPA. They always have been. The one court to have addressed this very issue to date rejected the same arguments advanced by the NAB.⁵ Moreover, no matter how much the NAB desires special treatment, this Commission is without authority to craft a special exemption for the NAB members wanting to use illegal prerecorded telemarketing as cheap tool to spike ratings.

I. PRERECORDED TELEMARKETING CALLS INITIATED BY RADIO OR TELEVISION STATIONS THAT ENCOURAGE TELEPHONE SUBSCRIBERS TO TUNE IN AT A PARTICULAR TIME FOR A CHANCE TO WIN A PRIZE OR SOME SIMILAR OPPORTUNITY FALL SQUARELY WITHIN THE PROHIBITIONS OF THE TCPA BECAUSE THEY ARE MADE FOR A COMMERCIAL PURPOSE AND CONTAIN UNSOLICITED ADVERTISEMENTS.

The NAB has coined the Orwellian phrase “prerecorded audience invitation calls” to refer to broadcasters’ prerecorded unsolicited advertisements. Clever tendentious characterization of the nature of these telemarketing calls should not allow the telemarketer to evade responsibility for its illegal conduct.⁶

The prerecorded telemarketing calls at issue here are made for a commercial purpose and contain unsolicited advertisements. When enacting the TCPA, Congress found that unrestricted telemarketing is an intrusive invasion of privacy, that people were outraged over intrusive calls to their homes from telemarketers, and that people consider prerecorded telephone calls – regardless

⁵ Garver v. Susquehanna Radio Corp., Order dated March 20, 2001, State Court Fulton County, Georgia, Civil Action No. 00-VS-002168-F (a copy is attached hereto as Exhibit A) (this case is currently before the Georgia Court of Appeals, oral arguments were held on September 18, 2002, and a decision is forthcoming).

⁶ See H.R. Rep. No. 317, 102d Cong., 1st Sess. 1991, p. 13 (stating “a call encouraging a purchase, rental or investment would fall within the definition [of telephone solicitation] . . . even though the caller purports to taking a poll or conducting a survey”); S. Rep. No. 177, 102d Cong., 1st Sess. 1991, p. 5 (same).

of the content or the initiator of the message – to be a nuisance and an invasion of privacy.⁷ Broadcasters’ schemes of using “prerecorded audience invitation calls” to spike ratings is precisely the type of activity prohibited by the TCPA.

A. These Telemarketing Calls Are Made for a Commercial Purpose.

It is a fundamental rule of statutory construction that where the language of a statute is plain and unambiguous, the terms used therein should be given their common and ordinary meaning.⁸

Pursuant to Congressional authorization, the FCC exempted those telephone calls “not made for a commercial purpose” from the prohibition on delivering prerecorded messages to residences.⁹

The common and ordinary meaning of “commercial” is “having profit as a chief aim.”¹⁰ The common and ordinary meaning of “purpose” is “the object toward which one strives or for which something exists; an aim or goal.”¹¹ Accordingly, the common and ordinary meaning of the phrase “commercial purpose” is “the objective of realizing profit.”

The NAB deceptively and erroneously seeks to equate calls having a “commercial purpose” with calls containing a “solicitation.” It then seeks to engraft into the meaning of “commercial purpose” the statutory definition of “telephone solicitation.” Congress and the FCC did not equate “solicitation” with “commercial purpose.” The term “telephone solicitation” is not even found in

⁷ Telephone Consumer Protection Act of 1991, PL 102-243, 105 Stat. 2394, § 2 (Congressional Statement of Findings).

⁸ E.g., Williams v. Taylor, 529 U.S. 420, 120 S.Ct. 1479, 1488 (2000).

⁹ See 47 U.S.C. § 227(b)(2)(B); 47 C.F.R. § 64.1200(c).

¹⁰ American Heritage Dictionary of the English Language (4th ed. 2000).

¹¹ Id.

the section of the TCPA at issue here. It is used in a subsequent section¹² dealing with “do not call” lists. In other words, the NAB’s argument about the meaning of “commercial purpose” is based on the definition of a different term, “telephone solicitation,” a term not used in the section of the TCPA pertinent to the issues about which the NAB was commenting.

Congress and the FCC did not find it necessary to define the term “commercial purpose.” Moreover, Congress and the FCC certainly did not adopt the peculiar meaning contended by the NAB so that only calls containing a solicitation would be deemed made for a commercial purpose.

Contrary to the NAB’s assertions,¹³ the FCC has never equated calls for a commercial purpose only with those containing solicitations.

In Paragraph 41 of this Commission’s earlier Report and Order regarding the TCPA,¹⁴ the FCC considered proposals to specifically exempt prerecorded message calls conducting research, market surveys and polling activities. This Commission determined that no specific exemptions were needed because such calls would be exempt as non-commercial under certain circumstances:

We find that the exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, political polling or similar activities which do not involve solicitation as defined by our rules. We thus reject as unnecessary the proposal to create specific exemptions for such activities.¹⁵

From this, the NAB seeks to manufacture the principle that a call without a solicitation is not made for a commercial purpose. The NAB is wrong.

¹² 47 U.S.C. § 227(c).

¹³ See NAB Comments at p. 9.

¹⁴ 7 F.C.C.R. 8752 (1992).

¹⁵ Report and Order, 7 F.C.C.R. 8752 ¶ 41 (1992) (footnotes ommitted).

The NAB's Comments¹⁶ quote Paragraph 41 of the FCC's earlier Report and Order¹⁷ but omits the footnotes. Footnote 77 references the second sentence of Paragraph 41 of the Report and Order (the first sentence quoted above). That footnote states that "market research or surveys would be prohibited under § 227 of the TCPA and 47 C.F.R. § 64.1200(a)(1) ". . . if such calls contain unsolicited advertisements."¹⁸

The phrase "unsolicited advertisement"¹⁹ is defined in the statute and regulations to mean "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."²⁰

A full reading of Paragraph 41 of the original Report and Order²¹ shows that calls conducting research, market surveys, political polling or similar activities are exempt as non-commercial or are exempt as commercial calls that do not contain unsolicited advertisements. This reading is reinforced by the treatment accorded debt collection calls in Paragraph 39 of the Report and Order.²² Here, too, this Commission determined that no specific exemption was needed because prerecorded

¹⁶ See NAB Comments at p. 9.

¹⁷ 7 F.C.C.R. 8752 (1992).

¹⁸ Report and Order, 7 F.C.C.R. 8752 n.77 (1992) (emphasis added).

¹⁹ A more detailed discussion regarding the fact that prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity contain unsolicited advertisements is included in Section IB, infra, and the Comments of Marc B. Hershovitz, Michael Jablonski, Ned Blumenthal and C. Ronald Ellington filed before the FCC in CG Docket No. 02-278 on November 20, 2002.

²⁰ 47 U.S.C. § 227(a)(4) (emphasis added); see also, 47 C.F.R. § 64.1200(f)(5) (identical definition to that found in 47 U.S.C. § 227).

²¹ 7 F.C.C.R. 8752 (1992).

²² See 7 F.C.C.R. 8752, 8773 ¶ 39 (1992).

calls from creditors would be exempt either because there was an established business relationship with the debtor or because the call, albeit commercial, did not contain an unsolicited advertisement. The FCC never said that a debt collection call would be exempt as a non-commercial call as long as it did not contain a solicitation, and it is silly to contend that such calls are not made for a commercial purpose (as the NAB apparently would based on its Comments).

Whether or not a call is made for a commercial purpose does not depend upon whether it contains a solicitation. ***While all calls containing a solicitation are made for a commercial purpose, not every call made for a commercial purpose contains a solicitation***, as the debt collection call example makes clear.

“Prerecorded audience invitation calls” – prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity – promote the commercial availability and quality of services (radio or television broadcasts) and property (the “prizes” given in exchange for listening or watching) and are transmitted without the called parties’ prior express invitation or permission.

A reading of Paragraph 41 of the Report and Order ***with its accompanying footnotes*** conclusively demonstrates that the NAB’s beloved prerecorded telemarketing calls are prohibited by the TCPA. They violate the TCPA because they are made for a commercial purpose, to boost the listenership and revenue of the stations employing them, and they contain unsolicited advertisements promoting the commercial availability and quality of the stations’ broadcasts.

B. These Telemarketing Calls Contain Unsolicited Advertisements.

The calls at issue do not fall within the exemption to the TCPA's ban on prerecorded message calls to residences for calls that do not contain "unsolicited advertisements" because they advertise (1) the commercial availability of a service (the station's broadcast service) and (2) the commercial availability of property (the prize, or the opportunity to win a prize, offered as a quid pro quo for tuning in).

The phrase "unsolicited advertisement" has been defined by Congress.²³ It means "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."²⁴ The NAB does not contend that broadcasters have prior express invitation or permission from anyone authorizing stations to call with prerecorded telemarketing messages. Accordingly, the issue is whether these "prerecorded audience invitation calls" promote "the commercial availability or quality of any property, goods, or services."²⁵ They do.

The NAB tries to persuade this Commission that radio and television stations' "prerecorded audience invitation calls" do not constitute advertisements because their principal purpose is not to generate a purchase. It tries to accomplish this by improperly injecting the requirement of generating a sale into the definition of "unsolicited advertisement." No such requirement exists.

The NAB repeatedly cites this Commission to H.R. Rep. No. 633, 101st Cong, 2d Sess. (1990) in its attempt to read a requirement of a sale into the definition of what constitutes an

²³ See 47 U.S.C. § 227(a)(4).

²⁴ Id.; see also, 47 C.F.R. § 64.1200(f)(5) (identical definition to that found in 47 U.S.C. § 227).

²⁵ See 47 U.S.C. § 227(a)(4).

unsolicited advertisement. The House Report relied on by the NAB discusses the 101st Congress's H.R. 2921, a bill similar to the TCPA but which was not passed by the 101st Congress before it adjourned. The TCPA was a different piece of legislation passed by the 102d Congress, an entirely different deliberative body than the 101st Congress.²⁶ The House Report the NAB cites is not authority, especially because the TCPA defines "unsolicited advertisement" without language equating an advertisement with making a sale. "We cannot search legislative history for congressional intent unless we find the statute unclear or ambiguous. Here, it is neither."²⁷

The TCPA defined the term "unsolicited advertisement." While the word "advertising" used in the definition of the term "unsolicited advertisement" is not itself defined, its common and ordinary meaning is "the activity of attracting public attention to a product or business as by paid announcements in print or on the air."²⁸

Radio and television stations' prerecorded telemarketing calls advertise, or seek to attract public attention to, (1) the commercial availability of a service (their broadcast service) and (2) the commercial availability of property (the "prizes" given in exchange for listening or watching).

1. These prerecorded telemarketing calls advertise the commercial availability of a service (a radio or television broadcast service).

Radio or television broadcasts are services given the (a) ordinary, contemporary, common meaning of the term, and (b) the FCC's classification of radio and television broadcasting as services.

²⁶ This Commission should recognize the fact that the biennial elections for members of the House of Representatives and elections for one-third of the Senate occurred in 1990. Thus the 102d Congress had a different membership than the 101st Congress.

²⁷ In re Abbott Laboratories, 51 F.3d 524 (5th Cir. 1995).

²⁸ American Heritage Dictionary of the English Language (4th ed. 2000).

“Service” means “work done for others as an occupation or business.”²⁹ Clearly, the business of providing entertainment and information by means of a radio or television broadcast is a service according to that term’s ordinary, contemporary, common meaning.

This Commission itself believes that radio and television broadcasts are services within the ordinary, contemporary, common meaning of the term. Part 73 of Title 47 of the Code of Federal Regulations set out the FCC Regulations governing radio broadcasts and is entitled “Radio Broadcast Services.” Part 76 of Title 47 of the Code of Federal Regulations is entitled “Multichannel Video and Cable Television Service.”

The NAB, seeking to create confusion where none exists, tries to “cut and paste” alternative definitions for “commercial purpose” and “unsolicited advertisement” into the TCPA as substitutes for what Congress and this Commission actually said. However, these attempts to muddle the clear legal waters is unavailing because, as the Fifth Circuit Court of Appeals recognized in In re Abbott Laboratories, “We cannot search legislative history for congressional intent unless we find the statute unclear or ambiguous. Here, it is neither.”³⁰

Prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity are designed to encourage those receiving the messages to make a choice in the radio or television broadcast service marketplace, a choice to listen to or watch a particular channel. That one does not necessarily have to pay cash to listen to or watch radio or television broadcast channels

²⁹ Id.

³⁰ 51 F.3d 524 (5th Cir. 1995).

is immaterial.³¹ Listening to or watching one station is a choice not to listen to or watch competing stations. The choice to listen to or watch a particular station represents a choice among the competing broadcast services. The prerecorded telemarketing calls at issue promote the commercial availability of the stations' broadcast services by trying to influence these choices.

Without question, these prerecorded telemarketing calls advertised the commercial availability and quality of the radio and television stations that use them.

2. These prerecorded telemarketing calls advertise the commercial availability of property (the “prizes” given in exchange for listening or watching).

Delivery of prerecorded messages advertising the commercial availability of property violate the TCPA. The telemarketing calls under consideration here unambiguously offer a chance to receive valuable property for listening to or watching certain radio or television programming.

Radio and television stations exhort the commercial availability and quality of property (the prize, or the opportunity to win a prize), and *offer an explicit quid pro quo* to the call recipient: listen or watch at certain times for the opportunity to receive the property.³²

³¹ Radio and television stations charge advertisers rather than listeners or viewers. Advertising rates are set based on a station's audience, the number of individuals tuning in to certain broadcasts. A station's advertisers pay when the listening public listens or watches a particular channel. The listening or viewing public may not pay cash to listen to or watch radio or television broadcast channels, but the stations certainly do get compensated when the public tunes in.

³² To be considered an “unsolicited advertisement” under the TCPA, the prerecorded message must promote “the commercial availability or quality of any property, goods, or services.” 47 U.S.C. § 227(a)(4) (emphasis added). The prerecorded telemarketing calls at issue promote ***both*** the commercial availability ***and*** quality of the “prizes” given in exchange for listening or watching. when they describe with specificity the “prize,” such as referring to airline frequent flyer miles as Delta SkyMiles. Brand identification exists for the sole purpose of distinguishing the source and quality of goods and services. The fact that this Commission requires broadcast stations to describe with specificity their “prizes” in all announcements about “prizes” awarded during their “contests” (continued...)

The property offered by telemarketing radio and television stations is varied. Frequently it is money. At other times it is tickets to concerts or sporting events or airline frequent flyer miles. Sometimes it may be intangible property, but it is property nonetheless. When an individual listens to or watches a radio or television broadcast for a chance to get the offered prize, the stations receive something of value – increased listener or viewership – for providing an opportunity to receive property. Quite simply, the radio and television stations exchange the prospect of receiving a prize for expanded listener or viewership.

The radio or television stations that initiate the telemarketing calls at issue do not give their “prizes” as gifts, acts of detached and disinterested generosity. They offer an exchange supported by consideration and mutuality of obligation.

Prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity offer explicit quid pro quos: listen or watch at certain times for the opportunity to receive valuable property. The NAB claims that there is no support for the proposition that listening to or watching a radio or television broadcast is legal consideration for the later receipt of the “prize” “given away” by the station. Any first year law student should quickly recognize this position of the NAB is sheer folly. The consideration and mutuality of obligation supporting this quid pro quo may not be of the character necessary to make the transaction illegal as a lottery or other game of

³²(...continued)
does not excuse the stations’ violations of the TCPA when the stations choose to promote their stations and “prizes” by engaging in prerecorded telemarketing advertising campaigns.

chance under FCC v. American Broadcasting Co.³³ or State ex rel Frizzell v. Highwood Serv., Inc.³⁴ the two cases misleadingly cited and discussed by the NAB.³⁵ Nevertheless, it is hornbook law that giving a chance to receive valuable property in exchange for listening or watching is supported by consideration and mutuality of obligation.³⁶ Whether listening or watching to radio or television broadcasts at stated times is sufficient consideration for a contract depends only on whether it was the requested detriment to the promisee induced by the promise.³⁷

American Broadcasting Co. held that radio and television station “give-away” contests do

³³ 347 U.S. 284 (1954).

³⁴ 473 P.2d 97 (Kan. 1970). Authorities are actually split as to whether “give-away” contests constitute lotteries for purpose of criminal law. The New Jersey Supreme Court held in an opinion by Chief Justice Vanderbilt that a grocery store “give-away” contest did constitute an illegal lottery under New Jersey law. Lucky Calendar Co. v. Cohen, 117 A.2d 487 (1955). The scheme in Lucky Calendar Co. required participants to visit an Acme Supermarket, and deposit a card on which their name and address was written. No purchase was necessary. The New Jersey Supreme Court held that the scheme was an illegal lottery, in part due to the consideration present, the detriment or inconvenience to the participant of visiting the supermarket which afforded a benefit to the store. Id. at 495. Applying Lucky Calendar Co. to the NAB’s “prerecorded audience invitation calls,” listening or watching at certain times is a detriment and inconvenience which enures to the benefit of the station, a classic form of consideration.

³⁵ Neither FCC v. American Broadcasting Co. or State ex rel Frizzell v. Highwood Serv., Inc. said that there was no consideration present in the transactions of the radio and television stations, they merely said that the consideration was not of the character necessary to make the transaction illegal as a lottery or other game of chance under the applicable statutes.

Any first year law student should be able to recognize that there are only two types of transactions: gifts and commercial transactions. Gifts are acts of detached and disinterested generosity, something the NAB recognizes their stations are not doing when they offer their “prizes” in exchange for people tuning in. That leaves commercial transactions which are identified by consideration, an interest or benefit accruing to one party or some forbearance, detriment, or responsibility given to, suffered or undertaken by another. The “prerecorded audience invitation calls” at issue clearly propose and promote commercial transactions.

³⁶ See Lucky Calendar Co. v. Cohen, 117 A.2d 487, 495 (1955).

³⁷ Id.

not constitute and illegal lottery under federal criminal law.³⁸ Frizzell held a television “give-away” program did not constitute an illegal lottery under Kansas law.³⁹ Neither American Broadcasting Co. nor Frizzell hold that their “give-away” programs failed to promote the commercial availability or quality of property, the prizes. Indeed, the promotion of the commercial availability and quality of the prizes is essential for the “give-away” program to achieve its objective.⁴⁰

The NAB also relies on Lutz Appellate Services, Inc. v. Curry⁴¹ to argue that not all advertisements are advertisements proscribed by the TCPA.⁴² It also makes the duplicitous argument that broadcast stations do not have a commercial relationship with their audiences.⁴³

The claimed violation of the TCPA in Lutz is far removed from the conduct at issue here. In Lutz, a former employee and now business competitor of the plaintiff on two occasions faxed an unsolicited message to Lutz Appellate Services seeking to hire away the plaintiff’s employees. The Lutz court correctly concluded that “a company’s advertisement of available job opportunities within its ranks is not the advertisement of the commercial availability of property.”⁴⁴ By its terms, the TCPA defines an “unsolicited advertisement” in reference only to the availability or quality of

³⁸ 347 U.S. 284 (1954).

³⁹ 473. P.2d 97 (Kan. 1970).

⁴⁰ The NAB absurdly stretches one more time when it urges that this Commission should consider dispositive its regulations that govern commercial air-time for children’s television programming. Such regulations are not “closely analogous” to the TCPA.

⁴¹ 895 F. Supp. 180 (E.D. Pa. 1994).

⁴² See NAB Comments at p. 12, n.43 and accompanying text.

⁴³ See id. at p. 6 and 13.

⁴⁴ Lutz, 859 F. Supp. at 181.

“property, goods or services,” not employment opportunities.⁴⁵

Unlike the defendant in Lutz, radio and television stations exhort the commercial availability and quality of services (their broadcast services) and property (the “prizes” given in exchange for listening or watching), and for the latter they offer an explicit quid pro quo (listen at certain times for the opportunity to receive valuable property).

The NAB cites Walt-West Enters, Inc. v. Gannett Co.⁴⁶ and Pathfinder Communications Corp. v. Midwest Communications Co.⁴⁷ for the proposition that listeners and viewers are not radio or television stations’ customers.⁴⁸ These cases have nothing to do with the issues before this Commission. Walt-West is a trademark and unfair business practices case dealing with confusion resulting from two radio stations both using the number “107” to reference its location on the radio dial. Pathfinder Communications Corp. is a trademark case dealing confusion over two stations’ similar call letters. Neither of these cases address the fact that listeners “pay” by subjecting themselves to advertising. They also do not address the fact that listening or watching to radio or television broadcasts at stated times is sufficient consideration for a contract as long as the act of listening or watching was the requested detriment. To argue that these cases dealing with the nuances of trademark law have relevance to the telemarketing laws promulgated by Congress shows the desperate lengths that the NAB will go to assist their members in avoiding responsibility for what clearly is illegal telemarketing.

⁴⁵ Id. at 181.

⁴⁶ 695 F.2d 1050 (7th Cir. 1982).

⁴⁷ 593 F. Supp. 281 (N.D.Ind. 1984).

⁴⁸ See NAB Comments at p. 6 and 13.

Prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity seek to boost the number of people listening to their broadcasts by providing a way for listeners to receive valuable property. These telemarketing messages promote the commercial availability and quality of the “prizes” given in exchange for listening or watching.⁴⁹

When an individual listens to or watches a radio or television broadcast in order to receive the “prizes” given in exchange for listening or watching, radio and television stations receive something of value (increased listener or viewership) for providing an opportunity to receive valuable property. Quite simply, stations making use of these “prerecorded audience invitation calls” exchange the prospect of receiving valuable property for an expanded audience.

Stations that mount these prerecorded answering machine advertising campaigns do not give “prizes” as gifts, acts of detached and disinterested generosity. They offer an exchange supported by consideration and mutuality of obligation.⁵⁰ These prerecorded telemarketing calls unambiguously advertise the commercial availability of property (the “prizes” given in exchange for listening or watching) and, accordingly, are prohibited by the TCPA.

3. There is no exemption from the TCPA’s ban on prerecorded messages to residences when such messages contain an unsolicited advertisement as defined by the statute.

The TCPA permits the FCC to exempt from the blanket prohibition on prerecorded message calls only such calls which are either (1) non-commercial or (2) commercial calls which do not

⁴⁹ See n.32, supra.

⁵⁰ As discussed earlier, listening or watching to radio or television broadcasts at stated times is sufficient consideration for a contract depends only on whether it was the requested detriment to the promisee induced by the promise. Lucky Calendar Co. v. Cohen, 117 A.2d 487, 495 (1955).

adversely affect the privacy rights the TCPA is intended to protect “AND which do not contain an unsolicited advertisement.”⁵¹ In other words, *Congress has stated that any prerecorded message call that contains an unsolicited advertisement is prohibited and is not subject to being exempt from such prohibition by FCC regulations.*⁵²

Prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity do significantly more than just invite the recipients of its recorded messages to listen to or watch a radio or television broadcast. They go a step further: they promise a chance to win valuable property to induce compliance. Accordingly, these telemarketing calls violate the TCPA. The calls advertise the commercial availability of property and therefore are unsolicited advertisements as prohibited by the TCPA.

II. THE TCPA IS A CONSTITUTIONAL PLACE AND MANNER RESTRICTION.

The NAB argues that the First Amendment to the U.S. Constitution immunizes broadcasters from governmental regulation.⁵³ That is simply not true. While the media does enjoy a favored

⁵¹ 47 U.S.C. § 227(b)(2)(B) (emphasis added).

⁵² Id.

⁵³ See NAB Comments at p. 18 n.62 and accompanying text. The cases cited by the NAB in support of this false proposition demonstrate the absurdity of the NAB’s arguments regarding this issue. The NAB cites Page v. Something Weird Video, 960 F. Supp. 1438 (C.D. Cal. 1996). This case involves an actress bringing an action against a video cassette distributor, alleging the distributor misappropriated the actress’s name and likeness by using her image in advertising for video cassettes of films in which she starred. This case is a celebrity right of publicity case; it is not remotely relevant to the issues of telemarketing calls made by radio or television stations.

The NAB also cites People v. Fogelson, 577 P.2d 677 (1978). This case, when read in its entirety, actually refutes all of NAB’s arguments. The California Supreme Court recognized in
(continued...)

status in our democracy, when the media acts as telemarketers they do not get special dispensation just because they are radio or television stations. If broadcasters and the press were immune from all government regulation when they act as telemarketers because of their status as a broadcaster or press, all businesses wanting to evade the TCPA merely would need to start distributing newsletters and then claim to be “vital communications services.”⁵⁴

The NAB fails to acknowledge a critical fact: *laws regulating a particular form of delivery of speech are constitutional*.⁵⁵

Additionally, the NAB’s constitutional arguments are aimed only at the FCC’s regulations

⁵³(...continued)

Fogelson that the state may “prevent undue harassment of passersby or interference with the business operations,” even if the conduct being regulated would otherwise be constitutionally protected. Id. at 681. The court went on to state that “individuals in public places cannot expect the same degree of protection from contact with others *as they are entitled to in their own homes.*” Id. (emphasis added). The issue of the NAB’s beloved “prerecorded audience invitation calls” is residential privacy. The United States Supreme Court recognizes the governmental interest in protecting the privacy of the home – the “last citadel of the tired, the weary, and the sick” in Justice Black’s famous phrase – is “of the highest order.” See Frisby v. Schultz, 487 U.S. 474, 484 (1988) (upholding ban on anti-abortion protesters picketing an individual’s home). When it comes to restrictions on speech, “the home is different.” Id.

The other cases cited by the NAB claiming broadcasters telemarketing calls are immune from government regulation are also cited out of context, do not stand for the proposition for which they are cited when read in full, or are not remotely relevant to the issues of telemarketing calls made by radio or television stations.

⁵⁴ When the NAB describes radio and television broadcasts as “vital communications *services*” (see NAB Comments at p. 19), the NAB belies its argument that their “prerecorded audience invitation calls” do not promote the commercial availability or quality of services

⁵⁵ See Kovacs v. Cooper, 336 U.S. 77, 83 (1949) (upholding prohibition on use of sound trucks); see also Moser v. F.C.C., 46 F.3d 970 (9th Cir.), cert. denied, 515 U.S. 1161 (1995) (holding TCPA constitutional in part because it completely bans prerecorded messages delivered by telephone).

because the TCPA itself contains a complete ban on the use of prerecorded messages.⁵⁶ The NAB's constitutional concerns necessarily are aimed at this Commission's regulations because laws regulating a particular form of delivery of speech are constitutional and the TCPA contains a complete ban on the use of prerecorded message calls to residences.⁵⁷ If this Commission's regulations are unconstitutional as the NAB argues, the prerecorded telemarketing calls at issue here are still illegal because the TCPA contains a complete ban on the use of prerecorded message calls to residences.⁵⁸

Congress constitutionally restricted the use of prerecorded messages delivered to residential telephone lines when it enacted the TCPA.⁵⁹ In Moser v. F.C.C., the United States Court of Appeals for the Ninth Circuit rejected a challenge to the TCPA on First Amendment grounds.⁶⁰ In fact, no court has ever found a constitutional infirmity in the TCPA's ban on the use of prerecorded messages delivered to residential telephone lines.

The TCPA ban on prerecorded messages delivered to residential telephone lines is a content-

⁵⁶ See 47 U.S.C. § 227(b)(1)(B).

⁵⁷ See Kovacs, 336 U.S. at 83 (upholding prohibition on use of sound trucks); 47 U.S.C. § 227(b)(1)(B).

⁵⁸ See Moser, 46 F.3d 970 (holding TCPA constitutional in part because it completely bans prerecorded messages delivered by telephone).

⁵⁹ Id.

⁶⁰ See also Szefczek v. Hillsborough Beacon, 668 A.2d 1099, 1109 (N.J. Sup. Ct. 1995) (holding TCPA's ban on prerecorded telemarketing calls does not violate First Amendment); cf. Bland v. Fessler, 88 F.3d 729, 739 (9th Cir. 1996) (holding California statute restricting use of prerecorded telemarketing calls did not violate First Amendment); Van Bergen v. Minnesota, 59 F.3d 1541 (1995) (holding Minnesota statute restricting use of automatic dialing and announcing devices did not violate First Amendment); Humphrey v. Casino Marketing Group, Inc., 491 N.W.2d 882, 891-92 (Minn. 1992) (holding Minnesota statute restricting use of automatic dialing and announcing devices did not violate First Amendment).

neutral place and manner restriction because the TCPA prohibits the delivery of all prerecorded message calls to the homes of people who have not consented to receiving them.⁶¹ “Commercial freedoms of speech” are not put in issue by the TCPA.

“The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community.”⁶²

The use of prerecorded messages delivered to residential answering machines by automatic dialing and announcing devices is the modern version of 1940s sound trucks. Both activities can be constitutionally restricted.

The Supreme Court recognizes the governmental interest in protecting the privacy of the home – the “last citadel of the tired, the weary, and the sick” in Justice Black’s famous phrase – is “of the highest order.”⁶³ When it comes to restrictions on speech, “the home is different.”⁶⁴

One important aspect of residential privacy is the protection of the unwilling listener.⁶⁵ “*There is simply no right to force speech into the home of an unwilling listener.*”⁶⁶ Radio and television stations engaging in the kind of telemarketing campaigns under discussion here do precisely that, they capture people’s home answering machines and compel those called to become unwilling listeners to their telemarketing spiels. Radio and television stations can claim no

⁶¹ Moser, 46 F.3d at 973.

⁶² Kovacs v. Cooper, 336 U.S. 77, 83 (1949) (upholding prohibition on use of sound trucks).

⁶³ See Frisby v. Schultz, 487 U.S. 474, 484 (1988) (upholding ban on anti-abortion protesters picketing an individual’s home) (emphasis added).

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

constitutional warrant to do this.

Like an ordinance barring sound trucks on city streets or protesters outside a home, Congress legally barred the delivery of prerecorded messages to residential answering machines. Automatic dialing and delivery devices playing prerecorded messages would crowd out other communications and destroy the quiet and tranquility people seek to maintain in their homes unless reasonable restrictions are imposed by legislative and regulatory action. *The rights of free speech do not compel government to allow the invasion of residential privacy.*

The NAB has the audacity to argue that Cox Radio, Inc. possesses a constitutional prerogative to place prerecorded advertisements on people's home answering machines just like this one from Britney Spears:

Hey, what's up? This is Britney Spears, Yeah, it's me. And now there's a brand new radio station in Atlanta that plays my music and all the best music—it's the new 95point5 The Beat. That new radio station everyone is talking about. Tune in 95.5 right now and tell your friends...Oh! And if you want to win ten thousand dollars, The Beat is giving it away, just listen for two songs back to back from me, Britney Spears, and be the 95th caller at 404-741-095point5 and you'll win from the new 95point5 The Beat Atlanta's new number one hit music station.⁶⁷

There is no such constitutional right.

The TCPA merely imposes restrictions on a particular manner of speech – prerecorded messages – delivered to a particular location, the home. Government can impose reasonable

⁶⁷ Transcript of prerecorded answering machine advertisement from WBTS-FM. Cox Radio, Inc. initiated hundreds of thousands of these “prerecorded audience invitation call” to leave messages on home answering machines in the Atlanta area on or about October 27, 1999.

restrictions on the time, place or manner of speech.⁶⁸

The TCPA does not limit broadcasters' right to get their messages out.⁶⁹ Instead of Cox Radio having Britney Spears record an advertisement to use in a telephonic assault, it could have had Ms. Spears personally call potential listeners to invite them to tune in.⁷⁰ *That some companies prefer the lower cost and greater efficiency of automated telemarketing on a vast scale to deliver prerecorded advertisements does not prevent Congress from restricting the practice.*

Radio and television stations do not get special dispensation when the Act as telemarketers just because they are radio or television stations. When they engage in telemarketing, their speech is no more or less protected than that of any other telemarketer. "Prerecorded audience invitation calls" – prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity – are illegal under the TCPA.

III. THE NAB ARGUMENT THAT ITS MEMBERS HAD A GOOD FAITH BELIEF THAT THEIR PRERECORDED TELEMARKETING CALLS WERE PERMISSIBLE IS FALSE.

The NAB says "broadcasters have relied in good faith on public statements by the Commission and by Congress" that "prerecorded audience invitation calls" are permissible under

⁶⁸ A more detailed discussion regarding time, place or manner restrictions on speech is included in the Comments of Marc B. Hershovitz, Michael Jablonski, Ned Blumenthal and C. Ronald Ellington filed before the FCC in CG Docket No. 02-278 on November 20, 2002.

⁶⁹ The TCPA allows "many alternative channels of communications, including the use of taped messages introduced by live speakers or taped messages to which consumers have consented, as well as all live solicitation calls." Moser, 46 F.3d at 975.

⁷⁰ See id.

the TCPA.⁷¹ That is not true.

In a January 13, 1999, Washington Post article, Dorothy Attwood, chief of enforcement of the FCC's common carrier bureau, was quoted regarding the very calls at issue as saying, "Our view is that there is an argument to be made that these are unsolicited calls that run afoul of the TCPA. It's certainly an incredible annoyance to get these messages."⁷² The public statement by Ms. Attwood was made more than nine months before Cox Radio began its telephonic assault on Atlanta's households with Britney Spears's prerecorded telemarketing spiel.

While Ms. Attwood said "there is an argument to be made," such a phrase was not meant to qualify her remarks to mean there was a meritorious argument that the calls were permissible. Ms. Attwood's statement was offered to rebut comments from a telemarketer taking the same position the NAB did with its Comments before the Commission on this matter. The telemarketer said he was "trying to hit answering machines" with radio and television station's "prerecorded audience invitation calls," and further went on to claim that, "If you got a [prerecorded message] call from someone like Dan Marino, wouldn't you love it."⁷³

The position taken by NAB regarding their members "prerecorded audience invitation calls" is simply not credible based on a fair reading of the TCPA and 47 C.F.R. § 64.1200. The NAB's position is rendered even less credible when one considers this Commission's chief enforcement

⁷¹ See NAB Comments at p. 4.

⁷² See Mark Leibovich, A Familiar Voice on the Phone: Telemarketers Using Pitches by Dick Clark, Other Celebrities, Washington Post, Jan. 13, 1999, A01 (a copy is attached hereto as Exhibit B).

⁷³ Id.

officer makes statements that she considers the calls at issue to “run afoul of the TCPA.”⁷⁴

The NAB also cries that if this Commission recognizes that the law prohibits the NAB members’ “prerecorded audience invitation calls,” it would “invite further class action litigation and expose broadcasters to potentially devastating liability.”⁷⁵ This argument ignores the obvious: *the scope of a station’s potential liability is set by the magnitude of the illegal conduct*. The fairness of the statutory penalty was decided by Congress when it enacted the TCPA. Congress designed a penalty not only to compensate for the actual damages and unquantifiable harm, but also to deter what it proscribed as illegal conduct.

When radio or television stations employ prerecorded telemarketing calls that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity, they do it on a massive scale.⁷⁶ The magnitude of a station’s liability is entire within the control of the station making the illegal telemarketing calls.

Conclusion

The FCC does not need to specifically address prerecorded messages sent by radio stations or television broadcasters that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity with additional rules. These calls are prohibited by the TCPA and current regulation. They always have been. Radio and television stations’ “commercial freedoms of speech” are not put in issue by the TCPA. When the media acts as

⁷⁴ Id.

⁷⁵ See NAB Comments at p. 4.

⁷⁶ In the Atlanta media market multiple radio stations each initiated “prerecorded audience invitation calls” hundreds of thousands times in 1999. See also Comments filed by The Broadcast Team in this Rule Making detailing that The Broadcast Team has made ***millions*** of prerecorded telemarketing calls on behalf of radio and television stations..

telemarketers they do not get special dispensation just because they are radio or television stations.

These calls by radio and television stations are illegal under the TCPA and current FCC regulation.

There is no need to clarify that which is already clear.

Respectfully submitted this 7th day of January, 2003.

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Exhibit A

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

MATT GARVER and RYAN SCHNEIDER,	:	
	:	
Plaintiffs,	:	
	:	CIVIL ACTION FILE
v.	:	NO.: 00-VS-002168-F
	:	
SUSQUEHANNA RADIO CORP.	:	
	:	
Defendant.	:	

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT AS TO PLAINTIFF RYAN SCHNEIDER
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO
PLAINTIFF MATT GARVER

This matter is before the Court on Defendant's Motion for Judgment on the Pleadings and a Motion To Stay Discovery. In addition, Plaintiffs filed a Motion for Partial Summary Judgment and Defendant filed a Cross Motion for Summary Judgment. The Court heard oral argument on October 24, 2000 and requested additional briefs from the parties addressing specific issues which were raised during the course of the hearing. The parties agree that there are no genuine issues of material fact and that this case presents a question of law. Upon consideration of all of the briefs, arguments, citation of authority, the Court enters the following order.

I. BACKGROUND

The Plaintiffs bring this action claiming that Defendant violated the Federal Telephone Consumer Protection Act, 47 U.S.C. §277(b)(1)(B) (hereinafter "TCPA")¹ as well as O.C.G.A. §46-5-23(a)(1) (hereinafter "ADAD"). Plaintiffs claim that the Defendant, Susquehanna Radio

¹For purposes of these motions, the parties have stipulated that under the holding of Hooters of Augusta, Inc. v. Nicholson 245 Ga. App. 363 (2000), reconsideration denied, that the TCPA authorizes a private cause of action in the state courts of Georgia.

Corporation, which owns and operates a local radio station known as 99X, violated the TCPA by delivering prerecorded messages to the Plaintiffs' personal residential phone lines and on their answering machines without the Plaintiffs' prior consent. Plaintiffs claim that they are entitled to statutory damages, punitive damages, and attorney's fees along with treble damages under the TCPA.

Defendant does not dispute that it delivered prerecorded messages to the Plaintiffs' phone lines, that the phone calls were generated interstate, or the content of the message. The speakers of the Defendants' messages are radio personalities (Jimmy Baron and Leslie Fram) who deliver the following messages:

Telemarketing Answering Machine Broadcast Number 1

"Hello. Hey, you there? Hello, pick up. Hey, it's Jimmy from 99-X calling. Yeah, I just wanted to know if I could borrow your car. Oh, I also needed to tell you about the 50,000 Delta Skymiles we're giving away on 99-X. Every Monday through Friday at 7, 11, 1, 3 and 5 - 50,000 Delta Skymiles. It ends this week. Look, if you need more information, just call (404) 287-1008 [ten oh eight]. So listen tomorrow morning at 7. And get back to me about your car."

Telemarketing Answering Machine Broadcast Number 2

"Hi. This is Leslie from the Morning-X on 99-X. I just wanted to make sure that you were included in Delta Destination II. Over the next 5 weeks, 99-X is giving away 7 million Delta Skymiles. I wanted to personally give you the times to listen each weekday to win. Starting at 7 AM on the Morning-X, and then at 11, 1, 3, and 5, you could win 50,000 Delta Skymiles. Here's the number to call for more information: (404) 266-0997. Good luck."

The Defendant claims that as a matter of law the delivery of such messages does not violate the TCPA for three reasons. First, Defendant contends that these calls are not made for commercial purposes. Second, Defendant contends that even if the calls are deemed to have been made for

commercial purposes, the message does not include the transmission of an unsolicited advertisement. Finally, with respect to Plaintiff Schneider, Defendant claims that it had an established business relationship with Plaintiff Schneider at the time the call was made so as to exempt this call from the prohibitions contained in the TCPA.

With respect to their claim under O.C.G.A. §46-5-23(a)(1), Plaintiffs have agreed that they will dismiss their claims under ADAD (counts 3 and 4 of the Complaint) upon the stipulation by Defendant that the calls were made interstate within the jurisdiction of the TCPA. Such stipulation was made at the hearing on October 24, 2000. Accordingly, this Court will not address such claims.

II. LEGAL AUTHORITY AND ANALYSIS

The TCPA is codified at 47 U.S.C. §227. In pertinent part, section (b)(1)(B) makes it “unlawful for any person within the United States... to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph 2(B).”

Paragraph 2(B) of the TCPA allows the Federal Communication Commission (hereinafter “FCC”) by rule or order to exempt from the previous prohibition calls which are not made for commercial purposes, classes or categories of calls made for commercial purposes which will not adversely affect the privacy rights intended to be protected under the Act, and calls which do not include the transmission of any unsolicited advertisement.

In accordance with Paragraph 2(B) of the statute, the FCC adopted exemptions to the general prohibition of initiating telephone calls to residential telephone lines using artificial or prerecorded

voices to deliver the message without the prior express consent of the called party. The following three exemptions are germane:

- (a) calls that are not made for a commercial purpose;
- (b) calls that are made for commercial purposes but do not include the transmission of any unsolicited advertisement; and
- (c) calls to any person with whom the caller has an established business relationship at the time the call is made.

See 47 CFR §64.1200(c)(1)-(3).

Thus, the issue before this Court is whether as a matter of law the telephone calls which were made to these Plaintiffs by Defendant are subject to the prohibition in the TCPA or whether they fall within any of the three above listed exemptions contained in the rules adopted by the FCC.

A. Non-commercial Purpose Exemption

As indicated above, the FCC has exempted from the prohibition of the TCPA any call that is not made for a “commercial purpose.” However, neither the TCPA nor the Code of Federal Regulations defines the term “commercial purpose.” Moreover, the parties have not cited any published court orders or opinions defining this term.

The Plaintiffs urge the Court to apply the plain and ordinary meaning of the words, citing Williams v. Taylor, 529 U.S. 420 (2000) and Ray M. Wright, Inc. v. Jones, 239 Ga. App. 521 (1991). Plaintiffs urge that the plain meaning of the term is readily ascertainable and that the term commercial means “something that is trying to realize a profit” and that the definition of purpose is an “aim or an objective.”

Defendant urges the Court to look at the FCC's pronouncement in the orders adopting this exemption. Defendant argues that because the TCPA expressly provided exemptions which were made by the FCC by way of rule or order, this Court should look not only to the specific provisions of the Code of Federal Regulations but also to the Report and Order of the FCC adopted September 17, 1992 regarding rules and regulations implementing the TCPA (hereinafter "Report and Order"). Under the authority of Trinity Broadcasting of Florida, Inc. v. FCC, 211 F.3d 618 (D.C. Cir. 2000) the Court will consider the Report and Order to ascertain whether it contains any directives or insight into the term "commercial purpose."

It is important to note at the outset that the Report and Order does not specifically define the term "commercial purpose." However, there is a section of the Report and Order (Paragraph 40) concerning "non-commercial calls." Defendant argues that under the Report and Order, if a call does not involve solicitation, it is therefore a call for a non-commercial purpose and is exempt from the prohibition of the TCPA. However, neither a reading of the Report and Order nor a reading of the specific exemptions contained in 47 CFR §64.1200 supports such a narrow definition of the term commercial purpose.

The Report and Order states that "the TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing activities." 7 F.C.C.R. at 8773. It goes on to state that "we conclude that tax exempt non-profit organizations should be exempt from the prohibition on pre-recorded messages to residence(s) as noncommercial calls." Id. At 8774. Such exemption for tax exempt non-profit organizations is also set forth in the Code of Federal Regulations. 47 C.F.R. §64.1200(c)(4). In addition, the Report and Order finds that an "exemption for non-commercial calls would include calls conducting research, market surveys, political polling or similar activities

which do not involve solicitation as defined by the rules.” 7 F.C.C.R. at 8774 (emphasis added). In adopting these rules, the FCC rejected a proposal to create specific exemptions for each one of these activities but instead concluded that the general non-commercial purpose exemption was broad enough to cover these activities.

It is apparent that in the Report and Order the FCC was merely suggesting that specific exemptions from the telemarketing ban for market surveys, political polling calls, conducting research, or similar activities which do not involve solicitation as defined by FCC rules were not necessary. The FCC did not suggest that the defining element of all non-commercial calls is the absence of solicitation nor did it state positively that in order for a call to be made for a commercial purpose, necessarily it must involve solicitation.² In fact, the Court can conceive of a number of types of commercial calls that do not contain solicitation, i.e., calls from a company confirming appointments for repairs or service; or calls to inform the customer that an ordered item has arrived and is available for pick up.

Therefore, in accordance with long standing principles of judicial statutory construction, the Court will give plain meaning to the term “commercial purpose.” Commercial is generally defined as relating to or engaged in commerce, designed for profits, supported by advertising. (See Webster’s II New Riverside Dictionary.) Under this definition, the Court finds that the message in the calls was in fact designed for the admitted purpose to increase listeners to the radio broadcast and advertise the radio station in the stream of commerce for the legitimate purpose of increasing or maintaining revenue by increasing advertising sponsors. In fact, Defendant states in its post hearing

² The Defendant would define solicitation as used in this provision in accordance with 47 U.S.C. §227 (a)(3) and this Court will apply that definition.

supplemental brief that it “indisputably possessed an ‘economic motivation’ for making the calls complained of in this lawsuit. Like companies conducting research, Defendant hoped that these calls would further its ability to market its product-e.g., commercial advertising time-more profitably to customers.” Therefore, the Court finds that the calls at issue in this case were made for a commercial purpose.

**B. Calls Made for a Commercial Purpose That Do Not Include
The Transmission of Any Unsolicited Advertisement**

Having ruled that the Defendant’s calls were made for a commercial purpose, the next inquiry is whether or not the calls include the transmission of any unsolicited advertisement, since calls for commercial purposes are exempt if they do not contain unsolicited advertisements. Fortunately, the term “unsolicited advertisement” has been defined in the statute. It means “any material advertising the commercial availability or quality of any property, goods, or services, which is transmitted to any person without that person’s prior express invitation or permission.” 42 U.S.C. §227(a)(4). In this case, the Defendant argues that even if the calls were deemed to be commercial, they do not contain an advertisement of the commercial availability or quality of any property, goods or services in that the radio broadcasts referred to in the calls are not property, goods or services. Defendant contends that radio broadcasts are not services, but rather speech so that advertising broadcasts are not advertising a service. However, there is no dispute that the messages advertise the availability of Delta Skymiles which will be given away to listeners on the air at specified times and in fact both messages gave the times to “listen each weekday” to win.

Under the above stated exemption, the telephone message need only advertise goods or services that are commercially available. There is no question that broadcast air time is something

that can be purchased on Defendant's radio stations to advertise goods or services (albeit not by the message recipients). More importantly, in this case, the Court finds that Defendant's own actions show that its radio broadcast is a service. On June 5, 2000, Defendant filed an application with United States Patent & Trademark Office to register the servicemark 99X and in connection with the application identified the goods and services as being radio broadcast services.³ The messages clearly advertise the availability of broadcasts at certain times. Moreover, even if the message is not deemed to advertise the availability of a service, i.e., the radio broadcast, there is no question that Defendant's telemarketing calls promoted the commercial availability of goods and/or property by advertising the availability of Delta Skymiles. Therefore, the Court finds that the calls transmitted contained unsolicited advertisements as that term is defined in 42 U.S.C. §227(a)(4).

C. Persons with Whom the Caller Has an Established Business Relationship

Finally, Defendant argues that even if the calls were made for a commercial purpose and even if they included the transmission of an unsolicited advertisement, the calls are not prohibited to persons with whom the caller has an established business relationship. Defendant contends that Plaintiff Ryan Schneider has an established business relationship by virtue of his participation in the Freeloader Program offered by 99X. In the Freeloader Program, a person can participate in the program and receive discounts on concert tickets, t-shirts and other benefits of being a subscriber to that program. Defendant submitted the affidavit of its General Manager, Mark Renier, who

³ Plaintiff submitted evidence of this application in its supplemental brief. Defendant has not objected to the evidence, so the Court has considered it.

described the Freeloader Program. Membership applications are available at 99X sponsored events and various Atlanta locations. Application forms may also be completed at the station's website, 99X.com. The applicant must provide his name, address, phone number, email address and other personal information. 99X then sends a membership card to the applicant.

Attached as Exhibit B to Mr. Renier's affidavit is Ryan Schneider's membership application, dated October 16, 1996. He updated his information on September 4, 1998. He expressly granted permission to be contacted by 99X and has not requested that he be removed from the program. 99X regularly contacts Freeloaders, currently about 235,000, with information about 99X-sponsored events, contests and discount offers. The contacts are made by phone, mail, email, newsletters and a magazine. A member may be removed from the program by submitting a written request. The Report and Order states:

[T]he rules define the "established business relationship" as a prior or existing relationship formed by a voluntary two-way communication between the caller and the called party, which relationship has not been previously terminated by either party. The relationship may be formed with or without an exchange of consideration on the basis of an inquiry, application, purchase or transaction by the residential telephone subscriber regarding products or services offered by the telemarketer. A broad definition of the business relationship can encompass a wide variety of business relationships without eliminating legitimate relationships not specifically mentioned in the record.

7 F.C.C.R. at 8771 (footnote omitted). Plaintiffs argue that this exemption is inapplicable since Mr. Schneider did not give 99X his home phone number when signing up for the Freeloader Program and because there is no nexus between the Freeloader Program and the call at issue in this case.

However, the exemption does not require such a nexus, nor does only providing a business phone number in the prior established business relationship make the exemption inapplicable.

In addition, the privacy interest of Mr. Schneider is diminished in this case where he entered into a business relationship with the Defendant. The Court finds that the enrollment in the Freeloader Program is an established business relationship between Plaintiff Ryan Schneider and the Defendant, so that, the calls made to him by the Defendant are exempt from the prohibitions of the TCPA. Defendant has not established that Plaintiff Matt Garver is a member of the Freeloader Program, and, therefore, the calls made to him come under the prohibitions of the TCPA.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's Motion for Summary Judgment as it relates to the claim brought by Plaintiff Ryan Schneider and **DENIES** the Defendant's Motion for Summary Judgment on the claims brought by Plaintiff Matt Garver. Defendant's Motion for Judgment on the Pleadings and Motion to Stay Discovery are **DENIED**. Plaintiffs' Motion for Partial Summary Judgment is **DENIED IN PART AND GRANTED IN PART** consistent with the terms of this Order.

SO ORDERED, this 20th day of March, 2001.

FILED IN OFFICE THIS DATE
20th Day of March 2001
Jal Ediff
Deputy Clerk, State Court
Fulton County, Georgia

Susan B. Forsling
Susan B. Forsling
Judge, State Court of Fulton County

Exhibit B



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A Familiar Voice on the Phone

Telemarketers Using Pitches by Dick Clark, Other Celebrities

By Mark Leibovich

Washington Post Staff Writer

Wednesday, January 13, 1999; Page A01

Dick Clark, ever ubiquitous on TV and radio, has found a new medium: telephone answering machines.

"Hi, this is Dick Clark," the ageless host told thousands of Washingtonians earlier this week. "I'm sorry to reach you at home, but I just wanted to call your attention to a television special I produced."

Clark is the latest celebrity to join an emerging chorus of famous telemarketers. Before, telemarketers were anonymous, low-paid strangers. But in recent months, real-life celebrities -- or at least taped versions of them -- have been carpet-bombing the nation's answering machines. Bill Clinton urged targeted voters to support Democratic candidates in November's elections. Singer Michael Bolton urged fans to buy a new album. As the National Basketball Association lockout dragged on, Orlando Magic owner Richard DeVos urged season ticket holders to "be patient."

While such taped celebrity pitches have Federal Communications Commission enforcement officials on alert, a Florida company that specializes in them reports that they are wildly popular -- especially compared with traditional telemarketing tactics. "Recipients love these things," said Rob Tuttle, chief executive of the Broadcast Team, a small Ormond Beach, Fla., firm that specializes in phone campaigns. It was Tuttle's firm that made the familiar voice of Dick Clark a little more so earlier this week -- and the Washington area was a target market for this telephonic assault.

Clark was promoting Monday night's American Music Awards. He told prospective viewers that the show would be on Channel 7 at 8 o'clock. He spoke in the relaxed manner of an old friend.

But some local targets were not amused. "People found the phone calls quite annoying," said Chris Pike, general manager of WJLA (Channel 7) in Washington, who said the station received a flurry of calls from angry viewers over the weekend.

Pike said that Channel 7 had nothing to do with the calls, and that they were commissioned by Dick Clark Productions, the Burbank, Calif., studio that produced Monday night's American Music Awards. Studio spokesman Logan Carr confirmed that it was Clark's voice on the messages and that calls were placed to selected U.S. markets.

Dick Clark Productions received about a dozen calls and electronic-mail messages from pitch recipients Monday, Carr said. The calls came less in anger than in confusion. "One guy was worried that his mother had gone over the bend because she was insisting Dick Clark called her," he said.

Clark himself was unavailable for comment yesterday, Carr said, because "he's busy doing cartoon voice-overs."

Tuttle said the phone calls are geared to answering machines rather than live people; most are placed during the day, when targets are presumed to be at work. If someone answers, the client (i.e., Dick Clark Productions) can automatically request that the call disconnect immediately.

"We're trying to hit answering machines," said Tuttle, who said his company has the capacity to complete more than 1 million calls a day. He won't divulge how many calls his company made in the Dick Clark campaign, or to what markets they were placed -- although Carr said Dick Clark Productions received reaction calls only from the Detroit and Washington areas.

Clients pay the Broadcast Team 25 to 75 cents per call, Tuttle said, depending on the length of the message left. It's cheaper, he said, for a company to leave messages than to send the same amount of direct mail. He said campaigns geared to answering machines generate far fewer complaints than calls that reach people in person. "When people get their messages, there's a perception that they missed the call from a friend," Tuttle said. Celebrities are coached during taping sessions on how to sound folksy and familiar. But most of them are used to public speaking, Tuttle said, so it generally comes easy.

"The voice sounds incredibly real and unscripted," said Steve Swetoha, director of ticket sales for the Orlando Magic, speaking of DeVos's message to 5,500 season ticket holders during the NBA lockout.

"Rich DeVos here," the Magic owner says matter-of-factly. "I'm sorry that we're using a tape recording for this, but we're trying to call all of our season ticket holders."

Swetoha said he is aware of no complaints from the ticket holders, although a few called to say, "Rich DeVos just called me -- what's going on?" "The team is contemplating similar promotions involving

Magic players, he said.

Entertainment businesses are turning increasingly to direct-marketing techniques to reach potential clients, said Chet Dalzell, spokesman for the Direct Marketing Association in New York. The trend raises dicey legal questions, especially since the 1991 passage of the Telephone Consumer Protection Act (TCPA), which placed restrictions on direct marketing.

While the TCPA limits the ability to complete a sale through an unsolicited phone call, there are broadly interpreted exceptions -- and the Broadcast Team has a team of lawyers steeped in the law and its subtleties, Tuttle said. For instance, while the law says a business cannot complete a sale to an unwilling customer over the phone, Tuttle points out that Dick Clark was not actually "completing a sale" but rather, simply, telling someone to watch something at a certain time, "like a friend."

This is debatable, said Dorothy Attwood, chief of enforcement at the common carrier bureau of the Federal Communications Commission. "Our view is that there is an argument to be made that these are unsolicited calls that run afoul of the TCPA," Attwood said. She said the commission will be monitoring such direct marketing closely as it proliferates.

"It's certainly an incredible annoyance to get these messages," Attwood said.

Not so, Tuttle said: "If you got a call from someone like Dan Marino, wouldn't you love it?"

Dick Clark's taped message can be heard at www.washingtonpost.com and on PostHaste by calling 202-334-9000 and using category No. 2335.

Celebrity Calling . . .

Dick Clark is among the celebrities now leaving promotional recorded messages on home answering machines. Here is the transcript of a recent message from Clark pitching "The American Music Awards":

"Hi, this is Dick Clark. I'm sorry to reach you at home but I just wanted to call your attention to a television special I produced. It's called "The American Music Awards" and it's on ABC Channel 7 Monday night at 8 o'clock. It's really the biggest music party of the year. It's called "The American Music Awards," lots of celebrities and terrific performances. It's a huge star-studded live event and I hope you get a chance to watch. It's "The American Music Awards" on Channel 7 Monday night. I think you'll like it. Hey, I'm sorry to call

you at home but I just wanted to personally invite you to watch. For more information you can check out the Web site www.americanmusicawards.com. Thanks so much."

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